

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALVIN JONES,)
)
Petitioner,) CASE NO. 2:06-cv-00775-RSL-JLW
)
v.)
)
TOM L. CAREY, Warden,) REPORT AND RECOMMENDATION
)
Respondent.)
_____)

I. SUMMARY

Petitioner Calvin Jones is currently incarcerated at the California State Prison, Solano in Vacaville, California. He was convicted by a jury of first-degree murder in Placer County Superior Court in 1973, and sentenced to seven-years-to-life with the possibility of parole. He has filed a petition for writ of habeas corpus, together with relevant portions of the state court record, under 28 U.S.C. § 2254 challenging his 2005 denial of parole by the Board of Parole Hearings of the State of California (the “Board”).¹ (*See* Docket 1 at 1-24.) Respondent has filed an answer to the petition, and petitioner has filed a traverse in reply to the answer. (*See* Dkt. 9; Dkt. 10.) The briefing is now complete and this matter is ripe for review. The

¹ The Board of Parole Hearings replaced the Board of Prison Terms, which was abolished on July 1, 2005. *See* California Penal Code § 5075(a).

01 Court, having thoroughly reviewed the record and briefing of the parties, recommends the
02 Court deny the petition, and dismiss this action with prejudice.

03 II. BACKGROUND

04 The Life Prisoner Evaluation Report relied upon by the Board during the 2005 parole
05 hearing set forth the following relevant facts:

06 “In 1969, Calvin Jones and Rosalio Estrada were co-owners of
07 Port City Liquors in Stockton, California. During 1970, Jones
08 and his partner (Estrada) decided to venture into the
09 construction business and took a third partner, Anthony C.
10 Virgilio (the victim) to form the Port City Construction
11 Company. The construction company was suffering financially.
12 On December 31, 1973, at approximately 7 p.m., the Stockton
13 Police found the victim lying in the street on the 400 block of
14 North Sutter Street, near his automobile, suffering from
15 multiple gunshot wounds to the arm, leg, chest, and abdomen,
16 coupled with lacerations to the face. The victim, prior to death,
17 informed authorities that Calvin Jones and Rosalio Estrada were
18 responsible for the shooting; however, he stated neither had
19 actually shot him. According to the victim, he had arrived for a
20 meeting with Calvin Jones at 920 North Hunter Street, but was
21 accosted by another man who shot him. Anthony C. Virgilio
22 died at St. Joseph’s Hospital at 9:15 p.m. on December 31,
1973.

Per the Probation Officer’s Report (POR), autopsy revealed the victim had been shot at least six times from a .38 caliber handgun. Furthermore, it was learned Jones and Estrada had secured a \$100,000 life insurance policy on the victim, shortly before the murder. Jones was not arrested for this offense until April 3, 1980. On June 28, 1983, Jones was found guilty by jury trial of Section 187, California Penal Code, First-Degree Murder. The case was heard in Placer County as a result of a change of venue from San Joaquin County. Charges against Rosalio Estrada were dismissed by the San Joaquin County District Attorney’s Office.”

22 (*See* Docket 9, Exhibit D at 1.)

01 As discussed above, although the commitment offense occurred on December 31,
02 1973, petitioner was not convicted by a jury of first-degree murder in Placer County Superior
03 Court until 1983. (*See id.* at 2.) Petitioner was sentenced to seven-years-to-life with the
04 possibility of parole, and his minimum eligible parole date was set for January 20, 1989. (*See*
05 Dkt. 1, Ex. A at 1.) The parole denial which is the subject of this petition took place after a
06 parole hearing held on August 1, 2005. This was petitioner's seventh subsequent and eighth
07 overall parole consideration hearing, and his application for parole was denied for three years.
08 (*See id.* at 21 and 39.) As of the date of the 2005 parole hearing, petitioner was approximately
09 sixty-one-years-old, and had been in custody for twenty-two years. (*See id.* at 25.)

10 After denial of his 2005 application, petitioner filed habeas corpus petitions in the
11 Placer County Superior Court, California Court of Appeal, and California Supreme Court.
12 (*See* Dkt. 9, Exs. E, F, and G.) Those petitions were unsuccessful. (*See id.*) This federal
13 habeas petition followed. Petitioner contends his 2005 denial by the Board violated his Fifth
14 and Fourteenth Amendment Due Process rights, as well as his Eighth Amendment right to be
15 free from cruel and unusual punishment. Thus, petitioner does not challenge the validity of
16 his conviction, but instead challenges the Board's 2005 decision finding him unsuitable for
17 parole.

18 III. STANDARD OF REVIEW

19 The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this
20 petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S.
21 320, 326-27 (1997). Because petitioner is in custody of the California Department of
22 Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive
vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir.), *cert.*

01 *denied*, 543 U.S. 991 (2004) (providing that § 2254 is “the exclusive vehicle for a habeas
02 petition by a state prisoner in custody pursuant to a state court judgment, even when the
03 petitioner is not challenging his underlying state court conviction.”). Under AEDPA, a
04 habeas petition may not be granted with respect to any claim adjudicated on the merits in state
05 court unless petitioner demonstrates that the highest state court decision rejecting his petition
06 was either “contrary to, or involved an unreasonable application of, clearly established
07 Federal law, as determined by the Supreme Court of the United States,” or “was based on an
08 unreasonable determination of the facts in light of the evidence presented in the State court
09 proceeding.” 28 U.S.C. § 2254(d)(1) and (2).

10 As a threshold matter, this Court must ascertain whether relevant federal law was
11 “clearly established” at the time of the state court’s decision. To make this determination, the
12 Court may only consider the holdings, as opposed to dicta, of the United States Supreme
13 Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit
14 precedent remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*,
15 331 F.3d 1062, 1069 (9th Cir. 2003).

16 The Court must then determine whether the state court’s decision was “contrary to, or
17 involved an unreasonable application of, clearly established Federal law.” *See Lockyer v.*
18 *Andrade*, 538 U.S. 63, 71 (2003). “Under the ‘contrary to’ clause, a federal habeas court may
19 grant the writ if the state court arrives at a conclusion opposite to that reached by [the
20 Supreme] Court on a question of law or if the state court decides a case differently than [the]
21 Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 412-13.

22 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the
state court identifies the correct governing legal principle from [the] Court’s decisions but

01 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all
02 times, a federal habeas court must keep in mind that it "may not issue the writ simply because
03 [it] concludes in its independent judgment that the relevant state-court decision applied clearly
04 established federal law erroneously or incorrectly. Rather that application must also be
05 [objectively] unreasonable." *Id.* at 411.

06 In each case, the petitioner has the burden of establishing that the state court decision
07 was contrary to, or involved an unreasonable application of, clearly established federal law.
08 *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). To determine
09 whether the petitioner has met this burden, a federal habeas court looks to the last reasoned
10 state court decision because subsequent unexplained orders upholding that judgment are
11 presumed to rest upon the same ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04
12 (1991); *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007).

13 Finally, AEDPA requires federal courts to give considerable deference to state court
14 decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1).
15 Federal courts are also bound by a state's interpretation of its own laws. *See Murtishaw v.*
16 *Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme*, 998 F.2d 710, 713
17 (9th Cir. 1993)).

18 IV. FEDERAL HABEAS CHALLENGES TO STATE PAROLE DENIALS

19 A. *Due Process Right to be Released on Parole*

20 Under the Fifth and Fourteenth Amendments to the United States Constitution, the
21 government is prohibited from depriving an inmate of life, liberty or property without the due
22 process of law. U.S. Const. amends. V, XIV. A prisoner's due process claim must be
analyzed in two steps: the first asks whether the state has interfered with a constitutionally

01 protected liberty or property interest of the prisoner, and the second asks whether the
02 procedures accompanying that interference were constitutionally sufficient. *Ky. Dep't of*
03 *Corrs. v. Thompson*, 490 U.S. 454, 460 (1989); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d
04 1123, 1127 (9th Cir. 2006).

05 Accordingly, our first inquiry is whether petitioner has a constitutionally protected
06 liberty interest in parole. The Supreme Court articulated the governing rule in this area in
07 *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482
08 U.S. 369 (1987). See *McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002) (applying
09 “the ‘clearly established’ framework of *Greenholtz* and *Allen*” to California’s parole scheme).
10 The Court in *Greenholtz* determined that although there is no constitutional right to be
11 conditionally released on parole, if a state’s statutory scheme employs mandatory language
12 that creates a presumption that parole release will be granted if certain designated findings are
13 made, the statute gives rise to a constitutional liberty interest. See *Greenholtz*, 442 U.S. at 7,
14 12; *Allen*, 482 U.S. at 377-78.

15 As discussed *infra*, California statutes and regulations afford a prisoner serving an
16 indeterminate life sentence an expectation of parole unless, in the judgment of the parole
17 authority, he “will pose an unreasonable risk of danger to society if released from prison.”
18 Title 15 Cal. Code Regs., § 2402(a). The Ninth Circuit has therefore held that “California’s
19 parole scheme gives rise to a cognizable liberty interest in release on parole.” *McQuillion*,
20 306 F.3d at 902. To similar effect, *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) held
21 that California Penal Code § 3041 vests all “prisoners whose sentences provide for the
22 possibility of parole with a constitutionally protected liberty interest in the receipt of a parole
release date, a liberty interest that is protected by the procedural safeguards of the Due

01 Process Clause.” This “liberty interest is created, not upon the grant of a parole date, but
02 upon the incarceration of the inmate.” *Biggs v. Terhune*, 334 F.3d 910, 915 (2003). *See also*
03 *Sass*, 461 F.3d at 1127.

04 Because the Board’s denial of parole interfered with petitioner’s constitutionally-
05 protected liberty interest, this Court must proceed to the second step in the procedural due
06 process analysis and determine whether the procedures accompanying that interference were
07 constitutionally sufficient. “[T]he Supreme Court [has] clearly established that a parole
08 board’s decision deprives a prisoner of due process with respect to this interest if the board’s
09 decision is not supported by ‘some evidence in the record.’” *Irons*, 505 F.3d at 851 (citing
10 *Superintendent v. Hill*, 472 U.S. 445, 457 (1985) (holding the “some evidence” standard
11 applies in prison disciplinary proceedings)). The “some evidence” standard requires this
12 Court to determine “whether there is any evidence in the record that could support the
13 conclusion reached by the disciplinary board.” *Hill*, 472 U.S. at 455-56. Although *Hill*
14 involved the accumulation of good time credits rather than release on parole, later cases have
15 held that the same constitutional principles apply in the parole context because both situations
16 directly affect the duration of the prison term. *See e.g., Jancsek v. Or. Bd. of Parole*, 833 F.2d
17 1389, 1390 (9th Cir. 1987) (adopting the “some evidence” standard set forth by the Supreme
18 Court in *Hill* in the parole context); *accord, Sass*, 461 F.3d at 1128-29); *Biggs*, 334 F.3d at
19 915; *McQuillion*, 306 F.3d at 904.

20 “The fundamental fairness guaranteed by the Due Process Clause does not require
21 courts to set aside decisions of prison administrators that have some basis in fact,” however.
22 *Hill*, 472 U.S. at 456. Similarly, the “some evidence” standard is not an invitation to examine
the entire record, independently assess witnesses’ credibility, or re-weigh the evidence. *Id.* at

01 455. Instead, it is there to ensure that an inmate's loss of parole was not arbitrarily imposed.
02 *See id.* at 454. The Court in *Hill* added an exclamation point to the limited scope of federal
03 habeas review when it upheld the finding of the prison administrators despite the Court's
04 characterization of the supporting evidence as "meager." *See id.* at 457.

05 B. *California's Statutory and Regulatory Scheme*

06 In order to determine whether "some evidence" supported the Board's decision with
07 respect to petitioner, this Court must consider the California statutes and regulations that
08 govern the Board's decision-making. *See Biggs*, 334 F.3d at 915. Under California law, the
09 Board is authorized to set release dates and grant parole for inmates with indeterminate
10 sentences. *See* Cal. Penal Code § 3040 and 5075, *et seq.* Section 3041(a) requires the Board
11 to meet with each inmate one year before the expiration of his minimum sentence and
12 normally set a release date in a manner that will provide uniform terms for offenses of similar
13 gravity and magnitude with respect to their threat to the public, as well as comply with
14 applicable sentencing rules. Subsection (b) of this section requires that the Board set a release
15 date "unless it determines that the gravity of current convicted offense or offenses, or the
16 timing and gravity of current or past convicted offense or offenses, is such that consideration
17 of the public safety requires a more lengthy period of incarceration." *Id.*, § 3041(b). Pursuant
18 to the mandate of § 3041(a), the Board must "establish criteria for the setting of parole release
19 dates" which take into account the number of victims of the offense as well as other factors in
20 mitigation or aggravation of the crime. The Board has therefore promulgated regulations
21 setting forth the guidelines it must follow when determining parole suitability. *See* 15 CCR
22 § 2402, *et seq.*

01 Accordingly, the Board is guided by the following regulations in making a
02 determination whether a prisoner is suitable for parole:

03 (a) General. The panel shall first determine whether the life
04 prisoner is suitable for release on parole. Regardless of the
05 length of time served, a life prisoner shall be found unsuitable
06 for and denied parole if in the judgment of the panel the
07 prisoner will pose an unreasonable risk of danger to society if
08 released from prison.

09 (b) Information Considered. All relevant, reliable information
10 available to the panel shall be considered in determining
11 suitability for parole. Such information shall include the
12 circumstances of the prisoner's social history; past and present
13 mental state; past criminal history, including involvement in
14 other criminal misconduct which is reliably documented; the
15 base and other commitment offenses, including behavior before,
16 during and after the crime; past and present attitude toward the
17 crime; any conditions of treatment or control, including the use
18 of special conditions under which the prisoner may safely be
19 released to the community; and any other information which
20 bears on the prisoner's suitability for release. Circumstances
21 which taken alone may not firmly establish unsuitability for
22 parole may contribute to a pattern which results in a finding of
unsuitability.

15 CCR § 2402(a) and (b). Subsections (c) and (d) also set forth suitability and unsuitability
factors to further assist the Board in analyzing whether an inmate should be granted parole,
although "the importance attached to any circumstance or combination of circumstances in a
particular case is left to the judgment of the panel." 15 CCR § 2402(c).

In examining its own statutory and regulatory framework, the California Supreme
Court in *In re Lawrence* recently held that the proper inquiry for a reviewing court is
"whether some evidence supports the *decision* of the Board ... that the inmate constitutes a
current threat to public safety, and not merely whether some evidence confirms the existence
of certain factual findings." *In re Lawrence*, 44 Cal.4th 1181, 1212 (2008). The court also

01 asserted that the Board's decision must demonstrate "an individualized consideration of the
02 specified criteria, but "[i]t is not the existence or nonexistence of suitability or unsuitability
03 factors that forms the crux of the parole decision; the significant circumstance is how those
04 factors interrelate to support a conclusion of current dangerousness to the public." *Id.* at
05 1204-05, 1212. As long as the evidence underlying the Board's decision has "some indicia of
06 reliability," parole has not been arbitrarily denied. *See Jancsek*, 833 F.2d at 1390. As the
07 California courts have continually noted, the Board's discretion in parole release matters is
08 very broad. *See Lawrence*, 44 Cal.4th at 1204. Thus, the penal code, corresponding
09 regulations, and California law clearly establish that the fundamental consideration in parole
10 decisions is public safety and an assessment of a prisoner's current dangerousness. *See id.*, at
11 1205-06.

12 C. *Summary of Governing Principles*

13 By virtue of California law, petitioner has a constitutional liberty interest in release on
14 parole. The parole authorities may decline to set a parole date only upon a finding that
15 petitioner's release would present an unreasonable present risk of danger to society if he is
16 released from prison. Where the parole authorities deny release, based upon an adverse
17 finding on that issue, the role of a federal habeas court is narrowly limited. It must deny relief
18 if there is "some evidence" in the record to support the parole authority's finding of present
19 dangerousness. The penal code, corresponding regulations, and California law clearly support
20 the foregoing interpretation.

21 V. PARTIES' CONTENTIONS

22 Petitioner contends that the Board violated his state and federal due process rights by
finding him unsuitable for parole without any evidence that he poses an unreasonable risk of

01 danger to society if released from prison.² (*See* Dkt. 1 at 5.) In addition, petitioner argues the
 02 Board failed to consider or give appropriate weight to evidence suggesting that petitioner was
 03 suitable for parole. (*See id.* at 4-7.) He also claims that the Board improperly considered
 04 views expressed by the San Joaquin District Attorney, including a letter alleging “elements
 05 that [were] not proven by a jury [at the] trial.” (*Id.* at 20-21.) Finally, petitioner contends that
 06 the Board “has failed to ‘reset’ petitioner’s term ... as an indeterminate sentence prisoner
 07 (ISL) whose crime was committed before July 1, 1977,” and that his indeterminate life
 08 sentence constitutes cruel and unusual punishment because it is disproportionate to his crime.
 09 (*Id.* at 9-20.)

10 Respondent claims that petitioner does not have a constitutionally protected liberty
 11 interest in being released on parole, that the “some evidence” standard is inapplicable in this
 12 context, and that even if he does have a protected liberty interest, the Board adequately
 13 predicated its denial of parole on “some evidence.” (*See* Dkt. 9 at 6-9.) Accordingly,
 14 respondent argues that petitioner’s due process rights were not violated by the Board’s 2005
 15 decision, and the Placer County Superior Court’s Order upholding the Board’s 2005 parole
 16 denial was not an unreasonable application of clearly established federal law. (*See id.* at 7-9.)

17 VI. ANALYSIS OF RECORD IN THIS CASE

18 A. *State Court Proceedings*

19 After the Placer County Superior Court denied his habeas petition, petitioner filed
 20 habeas petitions in the California Court of Appeal and California Supreme Court. (*See id.*,
 21 Exs. E-G.) Both petitions were summarily denied. (*See id.* at F and G.) Respondent admits

22 _____
² We do not reach petitioner’s claim that his state due process rights were violated, as state claims are not cognizable in a federal habeas petition. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (asserting that “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”).

01 that petitioner's habeas petition was timely, and petitioner properly exhausted each of his
02 claims before the California Supreme Court. (*See id.* at 3.) This Court reviews the Placer
03 County Superior Court's Order upholding the Board's decision to determine whether it meets
04 the deferential AEDPA standards, as it is the last reasoned state court decision. *See Ylst*, 501
05 U.S. at 803-04.

06 B. *Petitioner's Due Process Claim*

07 The Board based its decision that petitioner was unsuitable for parole primarily upon
08 his commitment offense, but also cited petitioner's pattern of criminality, insufficient
09 psychological evaluation, and opposition from the San Joaquin District Attorney. (*See* Dkt. 1,
10 Ex. A at 35-40.) The Board's findings tracked the applicable unsuitability and suitability
11 factors listed in § 2402(b), (c) and (d) of title 15 of the California Code of Regulations. After
12 considering all reliable evidence in the record, the Board concluded that evidence of
13 petitioner's positive behavior in prison did not outweigh evidence of his unsuitability for
14 parole. (*See id.* at 35.)

15 1. *Petitioner's Commitment Offense*

16 The Board primarily relied upon the circumstances of the commitment offense to find
17 petitioner unsuitable for parole. (*See id.* at 35-36.) Petitioner hired a "hit man" to murder the
18 victim in order to collect proceeds from a life insurance policy he had taken out without the
19 victim's knowledge. The panel explained that petitioner has "taken a position that [he] did
20 not do it, but as [the Board] indicated all along, we have to take the position that [petitioner]
21 did. That's what the record indicates and that's what we have to go on..." (*Id.* at 35.)

22 After reviewing the facts of the crime, the Board concluded the offense was "carried
out in [an especially] cruel and callous manner. [It was also] carried out in a dispassionate

01 and calculated manner, such as an execution style murder.” (*Id.*) See 15 CCR § 2402(c)(1)(B)
02 and (D). In addition, the Board found “[t]he motive for the crime [to be] inexplicable or very
03 trivial in relation to the offense....” (Dkt. 1, Ex. A at 35-36.) See 15 CCR § 2402(c)(1)(E).
04 Specifically, petitioner was motivated by the possibility of financial gain, because after
05 petitioner “hired or engaged somebody else to do the killing, [he] later went back [and
06 attempted] to collect on the life insurance policy” for approximately ten years following the
07 victim’s death. (Dkt. 1, Ex. A at 36.) The Board concluded that “the aggravated nature of
08 [petitioner’s] offense and the circumstances [in] which [petitioner] committed [it] caused us
09 great concern.” (*Id.*) Thus, the facts of petitioner’s commitment offense, a premeditated
10 murder carried out by a hired killer for financial gain, provide “some evidence” to support the
11 Board’s conclusion that petitioner would pose an unreasonable risk of danger to society or
12 threat to public safety if released from prison. (*Id.* at 35.)

13 2. *Petitioner’s Pattern of Criminality*

14 The Board also relied upon petitioner’s lengthy pattern of criminality to find him
15 unsuitable for parole. In order to make a suitability determination, the Board is required to
16 consider “[a]ll relevant, reliable information available to the panel ... including [a prisoner’s]
17 past criminal history, [such as] involvement in other criminal misconduct which is reliability
18 documented, [and] behavior before, during and after [the base and other commitment
19 offenses]....” 15 CCR § 2402(b).

20 In its decision, the Board pointed out that after the victim’s death, petitioner tried to
21 recover the insurance proceeds “for some close to ten years after the incident. And during
22 that period of time, [he was] not free from other involvement in criminal activity as indicated
by [petitioner’s] arrest for arson, arrest for insufficient funds, and both of those were

01 ultimately dismissed, but they involved, again, criminal activity looking towards gaining
02 money and by other means.” (Dkt. 1, Ex. A at 36-37.) In addition, petitioner was “convicted
03 of violations of federal narcotics laws [for] the sale of cocaine, an economic crime, and
04 sentenced to three years in federal prison. [He was also charged with] assault with a deadly
05 weapon during the time that [he was] out on appeal bond from [the narcotics] conviction.”
06 (*Id.* at 37.) Although petitioner’s narcotics charge was ultimately dismissed as a result of the
07 instant murder conviction, the Board noted that this dismissal “should not be considered as
08 being indicative of the lack of the liability of that offense.” (*Id.*) Finally, the Board
09 considered petitioner’s institutional history, including his most recent disciplinary violation
10 for conspiracy to introduce a controlled substance into the prison, which the Board noted
11 “indicates a pattern of criminality exceeding 20 years. That pattern of behavior [caused the
12 Board] great concern and ultimately resulted in termination of suitability.” (*Id.* at 37.) Thus,
13 petitioner’s pattern of criminality, including illegal conduct committed after the instant
14 offense but prior to his conviction, provides “some evidence” to support the Board’s
15 conclusion that petitioner would pose an unreasonable risk of danger to society or threat to
16 public safety if released from prison.

17 3. *Petitioner’s Insufficient Psychological Evaluation*

18 The Board also considered petitioner’s insufficient psychological evaluation during
19 the hearing. The applicable regulations require the Board to consider a prisoner’s “past and
20 present mental state” and “past and present attitude toward the crime....” *See* 15 CCR
21 § 2402(b). With respect to petitioner’s October 17, 2002, psychological report prepared by
22 Dr. VanCourving, which assessed petitioner’s “present risk of danger to the community” as
low, the Board found that it “can’t give [the psychologist’s assessment] that much credence

01 because there are [problematic] factors that she relies upon ... [For example,] she assumes
02 [petitioner's] version of what occurred." (Dkt. 1, Ex. A at 38.) The Board also observed that
03 the report is "either inaccurate or she has a lack of information to assess factors ... [a]nd it's
04 interesting to note [given petitioner's] history of narcotics traffic[king], the indication [in the
05 report] somehow that [petitioner does] not have a narcotics problem. So, we discount the
06 nature of the report although it's favorable...." (*Id.*) After reviewing the psychological
07 report, this Court finds "some evidence" in the record to support the Board's finding that the
08 psychological report, although positive, does not provide "relevant, reliable" evidence of
09 petitioner's suitability for parole.

10 4. *Opposition by the District Attorney*

11 Petitioner contends that the Board erred by expressly considering a letter from the San
12 Joaquin District Attorney dated July 16, 2005, which opposed petitioner's release on parole.
13 (*See* Dkt. 1 at 19-20; *id.*, Ex. A at 38.) In the letter, the District Attorney summarized the
14 offense, and argued that petitioner should be found unsuitable for parole because, among
15 other reasons, he "has failed to upgrade vocationally, [as his] last documented vocational
16 program was drafting in 1985." (*Id.*, Ex. A at 20.) The District Attorney also asserted that
17 until petitioner "accepts responsibility for the death of [the victim], upgrades vocationally,
18 and shows proof of employment opportunities, it is the opinion of our office that parole
19 [should] be denied...." (*Id.*)

20 In addition to his argument regarding the January 2005 letter, petitioner asserts that the
21 Board improperly considered another letter dated January 31, 2000, which was submitted by
22 the District Attorney at a prior hearing. (*See* Dkt. 1 at 20-21; *id.*, Ex. D.) Specifically,
petitioner claims the January 2000 letter, which explained the reason for the delay of

01 approximately ten years before petitioner was arrested for his crime, alleged “elements that
02 [were] not proven by a jury [at the] trial.” (*Id.* at 20-21.) Petitioner contends that due to the
03 Board’s consideration of the District Attorney’s unsubstantiated allegations, “[an] evidentiary
04 hearing must be Ordered [to] afford to Petitioner his constitutional rights under the Fifth,
05 Sixth, and Fourteenth Amendment to have a jury trial on all issues raised by the
06 Prosecution....” (*See id.* at 22.)

07 Petitioner’s arguments regarding the July 2005 letter are unavailing. In making its
08 suitability determination, the Board must “take into account all pertinent information and
09 input about the particular case from the inmate’s victims, the officials familiar with his or her
10 criminal background, and other members of the public who have an interest in the grant or
11 denial of parole to this prisoner.” *In re Dannenberg*, 34 Cal.4th 1061, 1086 (2005).
12 California law provides that a prosecutor may represent “the interests of the people” at a
13 parole hearing, and may “comment on the facts of the case and present an opinion about the
14 appropriate disposition.” *See* Cal. Penal Code § 3041.7; 15 CCR § 2030. *See also*
15 *Rosenkrantz v. Marshall*, 444 F. Supp. 2d 1063, 1080 n.14 (C.D. Cal. 2006) (noting that in the
16 absence of other reliable evidence of unsuitability in the record, opposition by law
17 enforcement based upon the nature of the commitment offense does not constitute “some
18 evidence” to support parole denial). Because the Board did not solely rely upon the District
19 Attorney’s statements to find petitioner unsuitable for parole, but also considered other
20 reliable evidence of unsuitability, its consideration of the District Attorney’s July 2005 letter
21 during its analysis was not arbitrary and capricious.

22 Although the Board did not expressly discuss the District Attorney’s January 2000
letter during the hearing, this Court can reasonably assume that the Board reviewed the letter

01 as part of petitioner's central file at the institution. California law does not require the Board
02 to limit its consideration to information "proven" at trial, as petitioner claims. Rather, the
03 regulations require the Board to consider "[a]ll relevant, reliable information available to the
04 panel" in order to determine whether, "in the judgment of the panel [a] prisoner will pose an
05 unreasonable risk of danger to society if released from prison." *See* 15 CCR § 2402(a) and
06 (b). Petitioner fails to provide any evidence demonstrating that the information contained in
07 the District Attorney's January 2000 letter constitutes "unreliable" information.

08 Finally, regardless of whether the Board's consideration of the District Attorney's
09 January 2000 letter constituted an error under California law, it cannot serve as a basis for
10 federal habeas relief. As discussed above, the Board's parole denial does not violate due
11 process unless there is no reliable evidence in the record which could support its finding that
12 the petitioner presents an unreasonable risk to society. Although the January 2000 letter
13 contained additional factual information regarding petitioner's offense which was unfavorable
14 to him, the facts upon which the Board relied were also supported elsewhere in the record.
15 (*See* Dkt. 1, Ex. D at 1-2.) As discussed below, there was sufficient evidence in the record to
16 deny parole without any consideration of the District Attorney's allegations. Accordingly,
17 petitioner is not entitled to an evidentiary hearing, or habeas relief, based upon this claim.

18 4. *Petitioner was Afforded Due Process of Law*

19 Contrary to petitioner's argument that the Board failed to consider or give appropriate
20 weight to the parole suitability rules which favored petitioner, the Board noted that
21 petitioner's "institutional record is fine. [Petitioner has] done well in here. [He has] broken
22 no law, other than as indicated. Apparently now, not a disciplinary problem, and [he is]
commended for those activities." (*Id.*, Ex. A at 37-38.) Despite the San Joaquin District

01 Attorney's arguments to the contrary, the Board also found that petitioner's "parole plans, as
02 indicated at this stage, seem to be viable. We understand that it's hard to assess what you
03 might do with respect to your disability until that disability is fully assessed by
04 (indiscernable). As it is, [petitioner seems] to have made [reasonable] plans should [he] be
05 released." (*Id.* at 38-39.) It is therefore an inaccurate characterization of the record to say
06 that the Board failed to provide petitioner with an individualized consideration of all relevant
07 factors, including factors which favored petitioner. (*See* Dkt. 1 at 4-7.)

08 As mentioned above, however, the Board has broad discretion to determine how
09 suitability and unsuitability factors interrelate to support its conclusion of current
10 dangerousness to the public. *See Lawrence*, 44 Cal.4th at 1212. Despite petitioner's recent
11 gains, the Board asserted that "given the nature of [his] offense and the longevity of it ...
12 [petitioner needs to] demonstrate a continued period of crime free behavior within the
13 institution to assure society that the egregious commitment offense and [petitioner's other]
14 criminal history" will not be repeated upon his release. (Dkt. 1, Ex. A at 39.) It also ordered
15 a new psychological evaluation to be completed before petitioner's next parole hearing. (*See*
16 *id.* at 40.) Thus, the Board's finding that petitioner would pose an unreasonable risk of danger
17 to society or threat to public safety if released on parole within the following three years was
18 reasonable, and supported by "some evidence" in the record. (*See id.* at 39 and 35.)

19 C. *Petitioner's Eighth Amendment Claim*

20 Petitioner contends that the Board violated his constitutional rights, including his
21 right to be free from cruel and unusual punishment under the Eighth Amendment, by failing
22 "to 'reset' petitioner's term ... as an indeterminate sentence prisoner (ISL) whose crime was
committed before July 1, 1977...." (Dkt. 1 at 9.) Because petitioner committed his first-

01 degree murder offense in 1973, when the ISL was still in effect, he received an indeterminate
02 sentence of seven-years-to-life when he was convicted and sentenced in 1983. (*See* Dkt. 1 at
03 2; *id.*, Ex. E at 1.) Here, petitioner specifically challenges the Board’s failure to fix a definite
04 term of “no more than 25 years ... [because] there is no such thing as a life maximum for
05 those who are serving a [term of] life with the possibility of parole....” (*Id.* at 14.) As
06 support for his assertions, petitioner cites the California Supreme Court decision *In re*
07 *Rodriguez*, which held that a prisoner whose maximum term was disproportionate to his
08 individual culpability had a right to a proportionate sentence to avoid the imposition of cruel
09 and unusual punishment. (*See id.* at 12.) *See also In re Rodriguez*, 14 Cal.3d 639, 651-52
10 (1975). As explained below, petitioner’s arguments are based upon a misunderstanding of
11 California’s repealed ISL and relevant case law, and are therefore without merit.

12 Under the ISL, which was California’s pre-1977 sentencing regime, “almost all
13 convicted felons received indeterminate terms, often with short minimums and life
14 maximums. Within this broad range, the parole authority was given virtually unbridled
15 statutory power to ‘determine and redetermine, after the actual commencement of the
16 imprisonment, what length of time, if any, such person shall be imprisoned,” and when to
17 allow those prisoners to be released on parole. *Dannenberg*, 34 Cal.4th at 1088. The ISL did
18 not require the parole authority to fix prisoners’ terms at anything less than the statutory
19 maximum. *See* Cal. Penal Code § 3041.

20 The unbridled discretion afforded to the parole authority by the ISL attracted criticism
21 by reformers, and would eventually lead to the enactment of the Determinate Sentencing Law
22 (“DSL”) in 1977. While the ISL was still in effect, however, “[c]ontemporaneous court
decisions and administrative developments, addressing problems in the indeterminate

01 sentencing law,” attempted to respond to some of these criticisms. *Dannenberg*, 34 Cal.4th at
02 1089. For example, petitioner cites the Chairman's Directive 75/20, which was issued by the
03 parole authority in April 1975. (*See* Dkt. 1 at 12.) Directive 75/20 “creat[ed] a structure for
04 setting parole dates based on listed ranges and factors. Following this directive, numerous
05 hearings were conducted to abolish the [parole authority’s] practice of deferring a decision on
06 parole and to establish fixed parole dates for almost all inmates [under the ISL].”
07 *Dannenberg*, 34 Cal.4th at 1089. *See also In re Stanley*, 54 Cal.App.3d 1030, *3 (1975)
08 (providing that Directive 75/20 “establishes [for each prisoner] a base offense ... [and] then
09 directs selection of either a typical or aggravated range for the base offense.”). The California
10 Court of Appeal later invalidated Directive 75/20, however, because it failed to base
11 prisoners’ parole release dates upon all factors relevant to their suitability for parole, such as
12 post-conviction behavior. *See Stanley*, 54 Cal.App.3d at *8-9.

13 In 1975 the California Supreme Court held that depending upon the particular
14 circumstances of the offense, a life-maximum sentence may be so grossly disproportionate to
15 the crime, such as assault with force likely to produce great bodily injury (under former Cal.
16 Penal Code § 245(a)), as to constitute cruel or unusual punishment under the Eighth
17 Amendment. *People v. Wingo*, 14 Cal.3d 169, 175-180 (1975). Specifically, the *Wingo* court
18 held that if an actual release date has been set by the Board, the proportionality of an
19 indeterminate sentence should be measured by that date. *See id.* at 183. The Supreme Court
20 recognized that term-setting by the Board was not mandatory, however, when it provided that
21 “[i]f the [parole authority], either by omission or by the exercise of its discretion, fails or
22 declines within a reasonable time to set a term, the particular conduct will be measured
against the statutory maximum [for the offense].” *Id.* at 184.

01 The case cited by petitioner, *In re Rodriguez*, was issued only two months after *Wingo*
02 and expanded upon the parole authority's term-fixing responsibilities under the ISL. In that
03 case, the California Supreme Court found that an inmate who had received the statutory
04 sentence of one-year-to-life for a single incident of lewd and lascivious conduct upon a child
05 under the age of fourteen had received a constitutionally disproportionate sentence for his
06 crime. *Rodriguez*, 14 Cal.3d at 644; *Dannenberg*, 24 Cal.4th at 1089. The *Rodriguez* court
07 then found that, as applied to that particular prisoner, the twenty-two years already served in
08 prison was excessive, and constituted cruel and unusual punishment. *Rodriguez*, 14 Cal.3d at
09 653-54. In addition, the *Rodriguez* court reasoned that the ISL must be construed as requiring
10 the parole authority to set actual maximum terms for all inmates that are proportionate to their
11 culpability, a duty derived from former § 3020, which is distinct from the parole authority's
12 power under § 3040 to decide if and when the prisoner is ready for parole. *Id.* at 652.

13 Thus, *Wingo* and *Rodriguez* established that the Board should set a term of years for
14 ISL prisoners, which is presumed to be the statutory maximum of the prisoners' sentence if no
15 other term has been set by the Board. In petitioner's case, no term of years beyond his
16 indeterminate sentence of seven-years-to-life has been explicitly set by the Board. As a
17 result, this Court presumes that petitioner's term is the statutory maximum, life imprisonment,
18 for his first-degree murder offense.

19 To the extent that petitioner's argument that his life sentence is unconstitutionally
20 disproportionate is based upon state law, his claim is not cognizable in this Court. *See Estelle*
21 *v. McGuire*, 502 U.S. 62, 67-68 (1991). Furthermore, to the extent that petitioner's claim is
22 based upon federal law, it is also unavailing. The United States Supreme Court has held that a
life sentence is constitutional, even for a non-violent property crime. *See Rummel v. Estelle*,

01 445 U.S. 263, 274 (1980) (upholding a life sentence with the possibility of parole, imposed
02 under a Texas recidivist statute, for a defendant convicted of obtaining \$120.75 by false
03 pretenses, an offense normally punishable by imprisonment for two to ten years); *Harmelin v.*
04 *Michigan*, 501 U.S. 957, 962-64 (1990) (upholding a sentence of life without the possibility
05 of parole for a defendant convicted of possessing more than 650 grams of cocaine, although it
06 was his first felony offense). Accordingly, a life sentence for a first-degree murder such as
07 that committed by petitioner would not constitute cruel and unusual punishment under the
08 Eighth Amendment to the U.S. Constitution. *See Banks v. Kramer*, 2009 WL 256449 (E.D.
09 Cal. 2009) (unpublished) (holding that a Board’s refusal to release a prisoner who was
10 sentenced to sixteen years-to-life for murder does not constitute cruel and unusual
11 punishment). The Board’s parole denial, and failure to “fix” the duration of petitioner’s
12 sentence, did not violate his constitutional rights.

13 D. *Placer County Superior Court Decision*

14 The Placer County Superior Court’s summation of the Board’s findings during the
15 2005 hearing contained several inaccuracies. (*See* Dkt. 9, Ex. E at 2.) For example, the
16 superior court erroneously stated that the Board found “Petitioner shot his business partner six
17 times,” and petitioner’s “counselor found petitioner to be ‘an unpredictable degree of threat to
18 the public’ if released.” (*Id.*) The Board actually found that petitioner was convicted of first-
19 degree murder for hiring another person to shoot the victim on his behalf, and that petitioner’s
20 October 17, 2002, psychologist’s report assessed petitioner’s “present risk of danger to the
21 community” as low. (*See* Dkt. 1, Ex. A at 7-8, 35-36, and 38.)

22 The fact that petitioner hired someone else to commit a murder, however, does not
diminish petitioner’s commitment offense as a factor tending to indicate unsuitability for

01 parole. Furthermore, the Board ultimately discounted “the nature of the [psychological]
02 report although it’s favorable” to petitioner because, among other reasons, the psychologist
03 apparently assumed petitioner’s version of the crime. (*Id.* at 38.) Thus, despite the
04 inaccuracies in the Placer County Superior Court’s summation, this Court finds that the
05 superior court correctly concluded that there was “some evidence” in the record to support the
06 Board’s parole denial.

07 VII. CONCLUSION

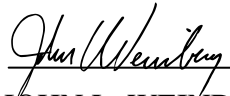
08 As stated above, it is beyond the authority of a federal habeas court to determine
09 whether evidence of suitability outweighs the circumstances of the commitment offense,
10 together with any other reliable evidence of unsuitability for parole. The Board has broad
11 discretion to determine how suitability and unsuitability factors interrelate to support its
12 conclusion of current dangerousness to the public. *See Lawrence*, 44 Cal.4th at 1212.
13 Although the Board praised petitioner’s recent progress in prison, it determined that petitioner
14 remains unpredictable, and therefore an unreasonable risk of danger to society if released.
15 Because the state court decision upholding the Board’s findings satisfies the “some evidence”
16 standard, there is no need to reach respondent’s argument that another standard applies.

17 Given the totality of the Board’s findings, there is “some evidence” that as of August
18 1, 2005, the date of the parole decision challenged in this case, petitioner’s release on parole
19 would have posed an unreasonable risk of danger to society or threat to public safety if
20 released from prison. The Placer County Superior Court’s Order upholding the Board’s
21 decision was not contrary to, or an unreasonable application of, clearly established federal
22 law, or based on an unreasonable determination of facts. I therefore recommend that the
Court find that petitioner’s due process rights were not violated, and that it deny his petition

01 and dismiss this action with prejudice.

02 This Report and Recommendation is submitted to the United States District Judge
03 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days
04 after being served with this Report and Recommendation, any party may file written
05 objections with this Court and serve a copy on all parties. Such a document should be
06 captioned "Objections to Magistrate Judge's Report and Recommendation." Failure to file
07 objections within the specified time may waive the right to appeal the District Court's Order.
08 *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this
09 Report and Recommendation.

10 DATED this 30th day of September, 2009.

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14 JOHN L. WEINBERG
15 United States Magistrate Judge
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